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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 1239.

S. L. Hurt, Petitioner,

versus

Cotton States Fertilizer Company et al., Respondents,
(District Court No. 301).

S. L. Hurt, Petitioner,

versus

Cotton States Fertilizer Company et al., Respondents,
(District Court No. 316).

S. L. Hurt et al., Petitioners,

versus

Frampton E. Ellis, as Administrator de Bonis Non Cum Testamento Annexo of the Estate of Joel Hurt, Sr., Deceased, et al., Respondents,
(District Court No. 324).

RESPONSE

Of the Respondents in District Court Cases Numbers 301 and 316, to the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

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RESPONSE

of Cotton States Fertilizer Company, C. B. Clay, and W. J. O'Shaughnessey, to the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

DISTRICT COURT CASE NO. 301.

This case was a stockholders' derivative action, instituted in the District Court of the United States for the Middle District of Georgia on June 14, 1944, by S. L. Hurt

and Mrs. Virginia L. Hurt (Mrs. Joel Hurt, Jr.). It was dismissed voluntarily as to Mrs. Hurt. It was first heard on July 6, 1944. The District Judge then held that the plaintiff was not entitled to sue. Upon appeal to the Circuit Court of Appeals, that judgment was reversed (Hurt v. Cotton States Fertilizer Company et al., 145 Fed. [2] 293).

The Circuit Court of Appeals there held that the plaintiff as a residuary legatee was at all times within which his complaint dealt, an equitable owner of the stock and therefore entitled to maintain the suit. The appellees filed in this Court their application for a writ of certiorari. It was denied (324 U. S. 844). Thereafter, the case was fully heard by the District Judge without a jury. Full findings of fact and of law were made. The judgment was for the defendants. It was adjudged that the prayer of the complaint be denied.

Upon appeal to the Circuit Court of Appeals, this judgment was affirmed, and remanded with a direction in one respect (159 Fed [2] 53).

Now comes this petition for certiorari.

Contrast of "Questions Presented" by Petition for Certiorari With Findings of Fact.

At page three of the petition for certiorari, under the heading "Questions Presented," the petition states as the first question, denominated 1a: "Whether, in a diversity jurisdiction suit, the Federal Courts in Georgia were free to decide, without reference to Georgia law, that there was nothing illegal, fraudulent, or otherwise exceptionable in the following transactions between Cotton States Fertilizer Company, a Georgia corporation, and certain of its officers and directors:

a. A transaction in which the three officers and directors of Cotton States caused the corporation to satisfy $49,102.68 of undisputed debts owing to it by one of the directors and a company in which he was interested, upon payment "of a part of the consideration to Cotton States and a part of it to the two other directors—it being undisputed that the two directors to whom the part was diverted paid Cotton States nothing for it."

At pages eight-ten, inclusive, of the petition for certiorari, this transaction is denominated "Howell Transaction." This transaction occurred in 1932, more than twelve years prior to the institution of the suit.

With respect to it, the District Judge specifically found:

> "In order for the Cotton States Fertilizer Company and its officers to be able to consummate the agreements of June 11, 1932, which had been made with Joel Hurt, Jr., it was necessary for there to be a unanimous vote of the stockholders of Cotton States Fertilizer Company. S. F. Howell was a stockholder, and his affirmative vote was necessary. During all negotiations in the early part of the summer of 1932 between Joel Hurt, Jr., S. A. Lynch, and the officers of Cotton States Fertilizer Company, Joel Hurt, Jr., was familiar with the fact that S. F. Howell and a company in which he was interested, the Planters Seed and Drug Company, owed Cotton States Fertilizer Company a large sum of money, which they were unable to pay on account of the depression, that Howell was a stockholder, and that his assent was necessary in order to consummate the agreements of June 11, 1932" (Finding of Fact 24; R. pages 1938-39).

The District Judge also specifically found:

> "Joel Hurt, Jr., knew prior to June 1, 1932, that it would be necessary to amend the charter of Cotton States Fertilizer Company in order to accept a sur-

render of common stock standing in the name of S. F. Howell" (Finding of Fact 25; R. page 1939).

The District Judge also specifically found:

"Prior to July, 1932, Joel Hurt, Jr., had been advised by George F. Thompson, then an officer and director of Cotton States Fertilizer Company, of the fact that a meeting of stockholders would have to be held, and that those things which were done at the meeting of stockholders of July 19, 1932, would have to be done" (Finding of Fact 26; R. page 1939).

The District Judge also found:

"As to all transactions complained of in the complaint, the defendants acted in good faith and exercised sound business judgment in the light of circumstances as they existed at the time of the various transactions" (Finding of Fact 70; R. page 1952).

[As to this "question presented" and the other two which will later be discussed, it is timely to call attention to the following language of the Circuit Court of Appeals in its opinion:

"As to No. 301, it will serve no useful purpose to detail the evidence as to each of the transactions under attack, nor to set out the findings of the District Judge as to them. It is sufficient to refer to the rule which declares that the findings of the District Judge must stand unless clearly erroneous, and to say that, except as hereinafter mentioned, the evidence fully supports the findings."

(Hurt v. Cotton States Fertilizer Company, 159 Fed. [2] 52, Loc. Cit. page 56)].

Question 1b states, with the same preface as 1a, the following:

"A transaction in which the officers and directors of Cotton States caused the Company to satisfy $18,352.75 of undisputed indebtedness owing to it by one of the

directors in consideration of his surrendering to Cotton States shares of its common stock at a time when the Company was admittedly insolvent and that said shares were worthless?" (Petition for Certiorari, page four.)

At page ten of the petition for certiorari, this "question presented" is denominated as the "Clay Transaction."

As to this transaction, the District Judge held as follows:

"In 1934, financial conditions in this area were in a depressed state. The financial affairs of Cotton States Fertilizer Company were such that it would have had to have been liquidated unless financial assistance could have been secured. The officers of the Company determined to apply to the Reconstruction Finance Corporation for a loan, to be secured by a first mortgage on all its assets. Erle Cocke, who had formerly been employed by the Company, was then Agency Manager of the Reconstruction Finance Corporation in Atlanta. Conferences were held by the officers of the Company with Cocke and W. J. Davis, Assistant Manager of the Reconstruction Finance Corporation, and the officers of the Company were advised that all assets on the books of the Company which were not collectible should be charged off before the formal application was filed. C. B. Clay and Growers Service and Supply Company were then indebted to the Company, and Joel Hurt, Jr., had knowledge of those indebtednesses. These accounts had become valueless. **Reconstruction Finance Corporation would not grant a loan unless Clay agreed to remain in active charge of the affairs of the Cotton States Fertilizer Company.** On June 30, 1933, the directors had authorized the Treasurer of the Company, in his discretion, to accept from Clay 338 shares of common stock of the Company to be placed in the treasury, in full settlement of the indebtedness then due by him to the Company. **George F. Thompson was at that time the**

majority common stockholder of the Company and in voting control of it. At the time the loan was made by Reconstruction Finance Corporation, it required Clay and Thompson personally to guaranty the loan."

"On July 21, 1934, a meeting of the Board of Directors of Cotton States Fertilizer Company was held and at that meeting the Company's investment in and advances to Growers Service and Supply Company were reduced to one dollar, and notes and accounts of C. B. Clay owing to the Company, in the amount of $18,352.75, were cancelled and removed from the balance sheet as of June 30, 1934, in consideration of the transfer and surrender by C. B. Clay to the treasury of the Company of 338 shares of common stock. At this time, Clay had agreed personally to guaranty the loan to be made by the Reconstruction Finance Corporation, and to remain in charge of the affairs of the Company. On July 24, 1934, George F. Thompson and W. J. O'Shaughnessey discussed with Joel Hurt, Jr., all affairs of the Company, including Clay's indebtedness to the Company and the Growers Service and Supply Company's indebtedness. Hurt was apprised of the Company's action in charging them off. On July 23, or 24, 1934, Thompson apprised Joel Hurt, Jr., of what had been done at the meeting of the directors of the Cotton States Fertilizer Company held on July 21, 1934." (Findings of Fact 27-31, inclusive; R. pages 1939-1941, inclusive.) (Emphasis ours.)

With full knowledge of these transactions, the plaintiff's agent consented to a write-down of the preferred stock of the Company, and as a result of the contract which immediately ensued, new preferred stock was issued to petitioner's family, in right of which he has sued (Findings of Fact 33-38; R. pages 1941-1943).

The sum and substance of the transaction was: Clay was indebted to the Company. Clay held stock in the Company. Clay was not in control of the Company. Clay was authorized by those in control to surrender part of

his stock in satisfaction of his indebtedness. Clay then personally guaranteed the R. F. C. loan, which permitted the Company to survive. This loan would not have been granted unless Clay agreed to remain in active charge of the affairs of the Cotton States Fertilizer Company. Clay did so agree.

In Finding of Fact No. 70, the trial Judge also held that in this transaction the defendants acted "in good faith and exercised sound business judgment in the light of circumstances as they existed at the time of the various transactions" (R. 1952).

> ". . . at the very time and as a part of the transactions of which plaintiff now complains, he and the others interested with him, knowing the difficult position the Company was in and the danger of its insolvency, agreed not only to cut their preferred shares in half, but to accept in lieu thereof certificates containing restrictive provisions, which prove more strongly than any oral testimony could do that everything that was done was in a desperate effort to rid a greatly encumbered concern of burdens and difficulties not otherwise to be borne by putting its exhausted and meager present in pledge in the hope of better times and prospects in the long future. The fact that the Company is now in greatly better shape than it was in then, that it has been yearly getting in better shape, that the R. F. C. loan is about to be or has already been paid off, and that in time the preferred stock, if conditions continue as at present, will be on a dividend basis and have real value, **testify not only to the absence of fraud doing, but to the wisdom and general fairness of the course then pursued, and completely explain, indeed justify, acts now seized upon by plaintiffs as fraudulent outrages.**"

The foregoing quotation is from the opinion of the Circuit Court of Appeals in this case, at page 57 of the 159 Fed. (2). The emphasis is ours.

With the same preface as hereinbefore stated, Transaction C is stated at page four of the petition for certiorari:

> "A transaction, carried out at a time when Cotton States was solvent and prospering, and its stock was valuable, in which two of the Company's officers and directors purchased on its behalf debts owing by it, together with shares of its common and preferred stock, but so manipulated the transaction that for $15.22 they got secretly and still retain stock thus purchased, which included the controlling common stock (607⅔ shares out of 1,035⅓ issued and outstanding)."

At page eleven of the petition, this is denominated as the "Thompson Transaction."

The contention of the petitioner with respect to this transaction, as expressed in his petition for certiorari, is strikingly different from the Findings of Fact made by the trial Judge with respect thereto, which Findings of Fact were affirmed by the Circuit Court of Appeals. The Findings of Fact are Numbers 67-69, inclusive (R. 1951-52), and are as follows:

> 67. "On and prior to April 30, 1943, C. B. Clay and W. J. O'Shaughnessey purchased valid and legal obligations due by Cotton States Fertilizer Company, which amounted, principal and interest, to $55,934.82. The obligations of the Company purchased by Clay and O'Shaughnessey had been shown on audits of the Company since their inception, and these indebtednesses were known or should have been known to Joel Hurt, Jr.
>
> 68. "The actual amount of money invested by C. B. Clay and W. J. O'Shaughnessey in their purchase of the obligations mentioned in the foregoing Finding, is $25,474.86, plus interest, making the aggregate $28,022.35. This amount was paid by the Company to C. B. Clay and W. J. O'Shaughnessey on December 30, 1944, and they immediately loaned $28,000.00 of it to

the Company at 5 per cent. interest per annum, so that the working capital of the Company would not be impaired.

"These debts are valid and legal obligations of the Cotton States Fertilizer Company, subordinated to the present Reconstruction Finance Corporation loan as it now exists.

69. "This method of handling the transactions considered in the preceding two Findings, benefited the Company to the extent of approximately $30,000.00."

That transaction is also covered by the general Finding of Fact Number 70.

With the same preface, the petitioner states Question 1d as follows:

"A course of practice over a period of years under which Cotton States' officers and directors used up the Company's distributable profit by paying it to themselves as salary increases and bonuses."

With respect to this, the District Judge held:

"At no time have the officers of the Cotton States Fertilizer Company voted to or paid themselves exorbitant salaries. The salaries and bonuses which have been paid and voted constitute reasonable allowances for personal services rendered. No salaries and bonuses have been paid or voted which violated the provisions of the outstanding preferred stock of Cotton States Fertilizer Company." (Findings of Fact Numbers 57-58; R. 1949.)

Based on all his Findings of Fact and Conclusions of Law, the trial Judge rendered a judgment denying all the prayers of the complaint. He had approved **all** salaries and bonuses paid as constituting reasonable allowances for personal services rendered. In this respect alone was his judgment modified by the Circuit Court of

Appeals. With respect to this phase, the Circuit Court of Appeals said:

> "In Cause No. 301, the judgment denied all the prayers of the complaint. These prayers, since the petition was filed April 18, 1944, certainly included the recovery of the retroactive bonuses voted in June, 1943, which we have condemned, and since, though the petition was not amended, evidence was offered without objection in respect of bonuses and additional compensation voted for 1944 and 1945, the petition may be considered amended so as to include them. The judgment in Cause No. 301, therefore, except as to the additional retroactive compensation voted in June, 1943, and as to bonuses and additional compensation voted in the years following, will be in all things affirmed. As to these bonuses and additional compensation, the Cause will be remanded with directions to permit amendment of the pleadings to bring them down to date in respect to the claims as to them, and to proceed to hearing and judgment in accordance herewith" (pages 60-61 of 159 Fed. [2]).

Under "Questions Presented," No. 2 is:

> "Whether in such a suit, the Federal Courts in Georgia were free to decide, without reference to Georgia law, that recovery is barred by reason of a showing that the representative of the injured shareholders was given, from time to time, such information that if he had caused it to be analyzed by counsel and accountants, he might have been put upon inquiry sooner regarding the transactions in suit."

The statement of this question is not in accord with the Findings of Fact.

At page 56 of the opinion of the Circuit Court of Appeals, the various wrongs alleged by the petitioner are stated seriatim. The first thus stated is denominated, in footnote 2, as the "Howell Deal." The second is denominated, "Growers Service and Supply Company."

Findings of Fact 24, 26, 30, 31, 63, 65 (R. 1938, 1939, 1940, 1941, 1950, 1951) show **actual knowledge** on the part of Joel Hurt, Jr., who is admitted to have been the agent of the petitioners (R. page 10) in these transactions. It was not necessary that he should have caused the information received by him to be "analyzed by counsel and accountants," to be apprized of the transactions. The Findings of Fact conclusively determine that he knew of them.

The same is true of what is denominated as the "Clay Deal." [Findings of Fact 27, 30, 31, 63, 64 (R. 1939, 1940, 1941, 1950, 1951).]

In Finding of Fact No. 30 (R. 1940) is a categorical finding that on July 24, 1934, "Hurt was apprized of the Company's action" in charging off Clay's indebtedness.

Finding of Fact No. 64 would, standing by itself, be conclusive of this question. That Finding of Fact is:

> "Prior to the issuance of the new or second of present preferred stock of Cotton States Fertilizer Company in 1934, Joel Hurt, Jr., knew of C. B. Clay's indebtedness to the Company and knew of the plans to charge this indebtedness off. He knew that the Reconstruction Finance Corporation required Clay's personal guaranty of any loan made by it to the Company, and knew that it would not make any loan unless Clay continued to manage the affairs of the Company" (R. 1951).

As to the "Thompson Deal", the record shows that petitioner's own accountant analyzed the books of the Company on September 23, 1943, and gave to petitioner information with respect to this transaction (Plaintiff's Exhibit "P"; R. 57, 61). This same accountant also reported fully with respect to salaries and bonuses (R. page 62).

> "All salaries and bonuses have been properly approved in the minutes of meetings" (Report of Petitioner's Auditor [R. page 62]).

All these salaries were shown in the annual audits of the Company made by certified public accountants.

> "The books and accounts of Cotton States Fertilizer Company have been open to the inspection of Joel Hurt, Jr., and the Executors of the last will and testament of Joel Hurt, Sr., at any time they desired to inspect them. Reports as to the condition of the Company and examinations made by L. D. Baggs & Company, Certified Public Accountants, and other certified public accountants, have been periodically sent to Joel Hurt, Jr., and S. L. Hurt" (Finding of Fact; R. 1940).
>
> "Viewed piecemeal or as a whole then, the record furnishes no support for the charges of fraud and overreaching, with which the petition so plentifully abounds. On the contrary, except as to the retroactive compensation voted in June, 1943, which is without legal basis, and perhaps as to bonuses and additional compensation voted for 1944 and 1945, it supports the Findings of the District Judge in effect that what was done was done, not fraudulently, oppressively, or illegally, but honestly, legally, and in good faith, and with the best interests of the corporation in mind" (Pages 59-60 of the Opinion of the Circuit Court of Appeals, 159 Fed. Rep. [2]).

Were these questions decided by the Federal Courts, "without reference to Georgia law?"

At page twenty-seven of the petition for certiorari, it is stated:

> "Not one Georgia case or provision of the statute was cited by the District or Circuit Court of Appeals to support their holding; and all pertinent decisions and Code provisions that we have found condemn them. The lower Courts completely ignored substantive local law in their disposition of these cases, in violation of this Court's mandates regarding the only right basis for decision in diversity jurisdiction cases."

The statement that the lower Courts "completely ignored the substantive local law in their disposition of these cases" is absolutely without foundation.

That the petitioner is in error in making such a statement can be conclusively shown by a simple comparison of the Georgia statute with the Conclusions of Law of the District Judge in these cases.

The "substantive local law" is found in Georgia statutes. It is found in Georgia Code Sections which are appended to the petition. Those Code Sections are Sections 22-710 and 22-711 of the Georgia Code of 1933 (Appendix to Petition for Writ of Certiorari, pages 32-33).

The Georgia statute, the "substantive local law", Section 22-710 of the Georgia Code of 1933, is:

> "So long as the majority of stockholders confine themselves within the charter powers, a Court of Equity will require a strong case of mismanagement or fraud before it will interfere with the internal management of the affairs of a corporation."

To apply this "substantive local law" in disposing of this case, the District Court held:

> "The common stockholders, officers, and directors of Cotton States Fertilizer Company, in the transactions complained of, confined themselves within the charter powers of the Company. The evidence does not disclose any mismanagement or fraud" (Conclusions of Law 11, 12; R. 1954).

The "substantive local law" as embodied in Georgia Code of 1933, Section 22-711, is that a minority stockholder may proceed in equity in behalf of himself and other stockholders for fraud, or acts ultra vires against a corporation, its officers, and those participating therein, when he and they are injured thereby. Before doing so,

he must demonstrate one of four factors. This statute provides that he must show some action or threatened action of the directors beyond the charter powers. Conclusion of Law No. 11 (R. 1954) is that the directors confined themselves within the charter powers.

Conclusion of Law No. 14 is:

> "No action or threatened action of the directors beyond the charter powers of the corporation is shown" (R. 1955).

Our Georgia statute provides there must be shown "such a fraudulent transaction, complete or threatened, among themselves or stockholders or others as will result in serious injury to the company or other stockholders."

Conclusion of Law No. 15 is:

> "No fraudulent transaction, completed or threatened, among the stockholders, directors, or others, is shown as would result in serious injury to the company or other stockholders" (R. 1955).

Our Georgia statute says:

> "There must be shown that a majority of the directors are acting in their own interest in a manner destructive of the company or of the rights of the other stockholders" (R. 1955).

Conclusion of Law 12, heretofore set out, disposes of this element of the statute.

Our Georgia statute provides it must be shown "that the majority stockholders are oppressively or illegally pursuing, in the name of the corporation, a course in violation of the rights of the stockholders, which can only be restrained by a Court of Equity."

Conclusion of Law No. 16 (R. 1955) categorically states: "The defendants are not and have not oppressively and

illegally pursued, in the name of the corporation, a course in violation of the rights of stockholders, which can only be restrained by a Court of Equity."

The truth of the case is that the trial Court and the Circuit Court of Appeals carefully measured the **facts** by the yardstick of the Georgia statute, and held:

> "The complaint, considered in connection with the Findings of Fact and the evidence, fails to state a claim upon which the relief sought can be granted. Under the Findings of Fact and the evidence, the plaintiff is not entitled to the relief sought" (Conclusions of Law Nos. 19 and 20, R. 1955).

The lower Courts also applied another provision of the "substantive local law." This same Section of the Code (22-711) provides that it must appear "that petitioner has acted promptly." The trial Court distinctly held: "The plaintiff did not act promptly with respect to the subject matter of the complaint" (Conclusion of Law 8; R. 1954).

Petitioner complains that neither the District Court nor the Circuit Court of Appeals cited a Georgia case. Perhaps both Courts thought that it was unnecessary to cite any decision when the Georgia **statute** controlled the case. It is noteworthy that **no Georgia case, now cited in the petition for writ of certiorari was cited to the Circuit Court of Appeals by the petitioner when he was the appellant in the Court below, except the case of Birch v. Anthony, 109 Ga. 349, and that case does not have to do with case No. 301, but was cited in connection with case No. 324.**

The statutes of the State of Georgia (Code of 1933, Section 22-711) provide under what circumstances a minority stockholder may proceed against a corporation, its officers and directors. The Conclusions of Law, as rendered by the trial Judge, and affirmed for the most part by the Circuit Court of Appeals, summarized are simply that the

plaintiff did not show by facts what he was required to show under that statute in order to have the relief he prayed.

In his Thirteenth Conclusion of Law, the trial Judge held that the evidence did not authorize him to interfere with the internal management of the affairs of the defendant Company. That finding was simply an application of the undisputed Georgia law to the facts of this case:

> "Where a minority stockholder in a corporation files an equitable petition against the corporation and the individual members thereof, who are majority stockholders, for appointment of a receiver, for audit of the books of the corporation, for dissolution of the corporation and settlement of its affairs, and that the defendants be enjoined from altering the status of the business of the corporation, the internal management of the corporation will not be interfered with by the court at the instance of a minority stockholder unless the majority stockholders are acting without the charter powers, or a strong case of mismanagement or fraud is shown. Bartow Lumber Co. v. Enwright, 131 Ga. 329 (62 S. E. 233). And see Civil Code (1910), Section 2224. No such facts are alleged in the petition as would authorize a court of equity to intervene in the instant case."
>
> Smith v. Albright-England Company et al., 171 Ga. 545 (3).

> "The internal management of a corporation will not be interfered with by the court, at the instance of a minority stockholder, unless the majority stockholders are acting without the charter powers, or a strong case of mismanagement, or fraud, is shown."
>
> Bartow Lumber Company et al. v. Enwright, 131 Ga. 329 (1).

These two cases are typical of those decided by the Supreme Court of Georgia, construing those sections of the Code which are now 22-710 and 22-711.

The trial Judge, in his Seventeenth Conclusion of Law, held that the delay on the part of the plaintiff in instituting his suit as to the transactions complained of prior to 1943, was unreasonable, and he is barred as to those transactions on account of laches. (He had already held that the method of handling the 1943 transactions benefited the Company to the extent of approximately $30,000.00. Finding of Fact 69.)

The Judge might well have concluded further that as to acts prior to 1943, the plaintiff was estopped by reason of the fact that the evidence indisputably showed that every such act complained of had either been participated in, acquiesced in, or ratified by him or his agent, Joel Hurt, Jr. The facts show such participation or acquiescence or ratification. The law is thus stated by the Supreme Court of Georgia in the case of Matthews v. Fort Valley Cotton Mills, 179 Ga. 580, 587:

> "Stockholders in a corporation who participate in the performance of an act, or acquiesce in and ratify the same, are estopped to complain thereof in equity."

The trial Judge's finding of laches is supported by the applicable law of the State of Georgia.

In the case of Winter et al. v. Southern Securities Company, 155 Ga., page 590, the Court, after holding that a stockholder has a right to inspect the books of the Company where the examination is asked in good faith and for an honest purpose, then held:

> "The petitioning minority stockholders having the right to inspect the books and records, including the minutes of the directors' meetings, for the purposes and under the circumstances named in the preceding headnote, and none of the acts of the officers and directors complained of having been committed since June, 1910, and the petition in the case having been

filed in the year 1922, the court properly sustained that ground of the demurrer based on laches. The delay on the part of the petitioners for such length of time was unreasonable."

H. N. 2, Winter v. Southern Securities Co., 155 Ga., page 591.

At page 602 of the opinion, the Court said:

"The petitioners having the right to inspect the books and records of the Securities Company, had at least constructive notice, and accordingly, as matter of law, were charged with notice from June 6, 1910, but took no action until the filing of this petition in 1922. It has been held by this court: 'The general rule is, that while a minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and other stockholders for fraud, conspiracy, or acts ultra vires, against a corporation, its officers, and others who participate therein, when the minority stockholders have been injured or damaged by such acts, they must act promptly. If they postpone their complaint for an unreasonable time, they forfeit their right to equitable relief.'"

Winter v. Southern Securities Company, 155 Ga. 602.

We also call attention to the case of Baker et al. v. Spokane Savings Bank et al., 71 Fed. (2d) 487, a decision of the Circuit Court of Appeals for the Ninth Circuit, decided June 4, 1934. In this case it is not shown the exact time that the suit of the stockholders was filed, but from the date of the decision of the case, it is apparent that such suit was certainly filed within five years of the alleged fraudulent act.

At pages 492-3 of the opinion, the Court said:

"It is claimed that the doctrine of laches is not applicable to the transactions between the society and the bank for the reason that the transactions

complained of were ultra vires, because the 'acts of the directors in attempting to convert all the assets of the Society to the Bank were unauthorized, void, and of no effect.' This contention is predicated upon the proposition that as the assets of a profitable and going corporation cannot be transferred without the consent of all the stockholders of the corporation, a mere lapse of time would not validate such unlawful and unauthorized acts. This view is erroneous. Laches is a defense to the action of a minority stockholder or shareholder to set aside corporate acts whether fraudulent or ultra vires."

The Court then cites the Georgia case of Winter v. Southern Securities Company, supra, in support of this holding on this question.

Furthermore, in the case of Rigdon v. Barfield, 194 Ga. 77, and particularly at page 82 of that opinion, the question of the effect of allegations of fraud upon the running of the statute of limitations is considered. It was there said:

"No reason is asserted why the fraud was not earlier known to the grantee, or why he could not have promptly ascertained the facts. So far as appears, he made no effort during eleven years and more to find out how much land was actually included in the deed. Under these circumstances, the bar of the statute is not tolled merely because he was in ignorance of the facts until about ninety days before the suit was brought. A person can not thus sit quietly by for a length of time exceeding that named in the statute of limitations, and avoid its operation and save his cause of action by the mere allegation that he made the discovery only within the last ninety days. The law exacts from him a reason for his delay, that it may judge of its soundness. Silence on this subject is fatal, when the statute is pleaded as here. Marler v. Simmons, 81 Ga. 611 (8 S. E. 190); Crawford v. Crawford, 134 Ga. 114, 121 (67 S. E. 673;

> 28 L. R. A. [N. S.] 353; 19 Ann. Cas. 932). The conclusion is that the bar of the statute is unaffected by complainant's reference to time of the discovery of the shortage."
>
> Rigdon v. Barfield, 194 Ga. 77, at page 82.

The cases which we have just cited were cited to the Circuit Court of Appeals at pages 194-198 of our brief there.

In the Specification of Errors (Petition for Certiorari, page 19), it is asserted: first: that the Circuit Court of Appeals erred in "holding without reference to Georgia law and prior thereto, that none of the transactions hereinabove set out were illegal, done in fraud of the Company, or otherwise exceptionable."

We have demonstrated that the Circuit Court of Appeals used the Georgia statute as a yardstick, as the District Judge had done, and by that yardstick measured the facts as found by the District Judge.

Then the petition asserts that the Circuit Court of Appeals erred "in holding, without reference to Georgia law and contrary thereto, that ambiguous and equivocal disclosures to the injured stockholders barred recovery in the Company's behalf for the said transactions."

We have shown by a review of the Findings of Fact that the "disclosures" were not "ambiguous and equivocal", but that the petitioner or his agent had **"actual knowledge of these transactions as they developed"**.

CASE NO. 316.

It is asserted at page 19 of the petition for certiorari that in Case No. 316, the Circuit Court of Appeals erred as follows:

"(A) In holding that the petitioner had abandoned his appeal therein.

"(B) In affirming dismissal on the ground that the stock, in right of which petitioner sues, was acquired by him after the occurrence of the things he complains of."

At page 27 of the petition for certiorari, it is stated:

"There was no justification, therefore, for the holding that 'appellant has abandoned here his appeal from the judgment in Cause No. 316'."

This petition is submitted by Murray C. Bernays, Esquire, as counsel. Mr. Bernays was not counsel, nor of counsel when the case was argued in the Circuit Court of Appeals. He probably did not know when he prepared this petition for certiorari that counsel who argued the case for the now petitioner, in the Court below (Mr. John L. Westmoreland) made the statement in his oral argument before the Court, that Cause No. 316 had served its purpose.

We apprehend that that was the "justification" for the Court's treatment of Cause No. 316.

CONCLUSION.

This is simply a case in which a preferred stockholder brought a derivative action against the corporation and certain of its officers and directors, alleging various wrongs. The evidence failed to support the allegations of the petition.

"Viewed piecemeal or as a whole then, the record furnishes no support for the charges of fraud and overreaching with which the petition so plentifully abounds."

Circuit Court of Appeals Decision, 159 Fed. (2), 52, 59.

"It is sufficient to refer to the rule which declares that the findings of the District Judge must stand, unless clearly erroneous, and to say that except as hereafter mentioned, the evidence fully supports the findings."

Circuit Court of Appeals Decision, 159 Federal (2), at page 56.

We respectfully submit that the petition for certiorari should be denied.

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ELLSWORTH HALL, JR.,
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